IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 18, 2002 Session

NORMAN POWER, ET AL. v. JEFFERSON COUNTY BOARD OF ZONING APPEALS

Appeal from the Chancery Court for Jefferson County
No. 00-140 Kindell Lawson, Judge

FILED JUNE 7, 2002

No. E2001-02310-COA-R3-CV

Norman Power and Mary Lynne Power (collectively "the Powers") filed a petition for writ of certiorari challenging the decision of the defendant Jefferson County Board of Zoning Appeals ("the Board") finding that the Powers' commercial racetrack and motor cross trail were not pre-existing uses entitled to the protection of the "grandfather" statute, T.C.A. § 13-7-208 (1999). The Board, after hearing conflicting evidence, determined that the subject property was not being used as a racetrack or motor cross facility prior to the enactment of the Jefferson County zoning ordinance that prohibits such use on the subject property. The trial court affirmed the Board's ruling. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and HERSCHEL P. FRANKS, J., joined.

Clinton R. Anderson, Morristown, for the appellants, Norman and Mary Lynne Power.

Jeffrey L. Jones and Steven Douglas Drinnon, Dandridge, for the appellee, Jefferson County Board of Zoning Appeals.

OPINION

I.

The Powers' property was not subject to a zoning ordinance prior to August 17, 1998. On that date, Jefferson County's new zoning ordinance went into effect. The ordinance classified the Powers' property as "A-1 (Agricultural - Forestry)." In March 2000, it came to the attention of the

Jefferson County Zoning Officer, Robert Elwood, that the Powers were building motorcycle courses and a circular racetrack, and conducting motorcycle and four-wheeler races on the subject property. Because these uses are not allowed in the A-1 zone, Elwood mailed the Powers a stop work order. Several days later Mr. Power came to Elwood's office and requested that the uses of his property as a motor vehicle racing facility be "grandfathered" as uses pre-existing the effective date of the new zoning ordinance. Elwood placed this request on the agenda of the Board of Zoning Appeals.

The Board initially heard this matter on April 10, 2000. At that meeting, the Powers asked that the various motor vehicle-related uses of their property be designated as pre-existing, nonconforming uses. The Board voted to defer action so its members could conduct an on-site examination of the property.

At its June 12, 2000, meeting, the Board listened to the argument of counsel for the Powers and the County Attorney. It also heard the testimony of several witnesses, and received documentary evidence, including the sworn statements of several witnesses, aerial photographs, and a package of documents that the Powers argued supported their claim. The four distinct uses of the Powers' property were identified as follows: (1) a "demolition derby" area; (2) a parking lot area; (3) a circular racetrack; and (4) a winding motor cross trail. The Board again voted to defer action in order to afford members of the Board an opportunity to read and evaluate the documentary evidence.

At the Board's July 10, 2000, meeting, it heard no further proof. Rather, it discussed the issue, and asked its staff member for a recommendation regarding the subject property. The staff member stated his belief that the evidence supported that only the demolition derby area and the parking lot area be granted "vested rights" to continue operation. The Board agreed and voted to allow continuation of the demolition derby and parking lot uses only.

The Powers then filed a petition for writ of certiorari in the Jefferson County Chancery Court, seeking review of the Board's decision. Judge Kindell Lawson, sitting by interchange, heard the argument of counsel and reviewed the record from the Board's three hearings. The court found that the Board's decision was based on substantial material evidence and had a rational basis. Consequently, it affirmed the Board's ruling.

The Powers appeal, raising two issues, which we quote verbatim from their brief:

> (1) Did the court err in holding that only two non-conforming uses, a demolition derby area, and parking lot, were to be allowed on the Power property, and, that the round track and motorcycle (motor cross) trail, were not entitled to protection under T.C.A. § 13-7-208, the "grandfather statute"?
>
> (2) Did the court err in not holding that the two uses which were found not to have pre-existed the ordinance, were allowable expansions of the pre-existing uses?

II.

In ***McCallen v. City of Memphis***, 786 S.W.2d 633 (Tenn. 1990), the Supreme Court stated the following regarding the standard of review in a case such as the one at bar:

> Review under the common law writ [of certioriari] is limited to whether "the inferior board or tribunal (1) has exceeded its jurisdiction, or (2) has acted illegally, arbitrarily, or fraudulently."
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> * * *
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> The courts must determine whether the action of the [local administrative body] in the exercise of its administrative, judicial or quasi-judicial function was illegal or in excess of jurisdiction.
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> * * *
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> The "fairly debatable, rational basis," as applied to legislative acts, and the "illegal, arbitrary and capricious" standard relative to administrative acts are essentially the same. In either instance, the court's primary resolve is to refrain from substituting its judgment for that of the local governmental body. An action will be invalidated only if it constitutes an abuse of discretion. If "any possible reason" exists justifying the action, it will be upheld. Both legislative and administrative decisions are presumed to be valid and a heavy burden of proof rests upon the shoulders of the party who challenges the action.

Id. at 638, 640, 641. Under this standard, we are not permitted to reweigh the evidence, or scrutinize the intrinsic correctness of the decision. ***Lafferty v. City of Winchester***, 46 S.W.3d 752, 759 (Tenn. Ct. App. 2000). "A decision by a local zoning board will be considered arbitrary only where there is no evidence in the record to support it." ***Id***.

III.

The Board received evidence as to which, if any, of the various uses of the subject property should be "grandfathered" and allowed to continue as pre-existing, nonconforming uses, pursuant to T.C.A. § 13-7-208(b). That statute provides as follows:

> In the event that a zoning change occurs in any land area where such land area was not previously covered by any zoning restrictions of any governmental agency of this state or its political subdivisions, or where such land area is covered by zoning restrictions of a

> governmental agency of this state or its political subdivisions, and such zoning restrictions differ from zoning restrictions imposed after the zoning change, then any industrial, commercial or business establishment *in operation*, permitted to operate under zoning regulations or exceptions thereto prior to the zoning change shall be allowed to continue in operation and be permitted; provided, that no change in the use of the land is undertaken by such industry or business.

Id. (emphasis provided). Thus, the issue presented to the Board was which, if any, of the motor vehicle-related activities was "in operation" prior to August 17, 1998, the effective date of the zoning ordinance.

The Board, after hearing and considering the evidence presented by each side, found that only the demolition derby and parking lot areas were in operation prior to August 17, 1998. We have reviewed the record and find that the Board acted in a deliberate and rational manner, and that there is material evidence to support its finding. Based on the sworn testimony of several witnesses, the Board reasonably could have concluded that neither the racetrack nor the motor cross facility was in existence, or in operation, prior to August 17, 1998. Creed Seay, the owner of property adjacent to the subject property, testified that, from his personal knowledge and observation, "the only thing that was in existence on this piece of property prior--going up to zoning, county wide zoning, the only thing that was in existence was the demolition derby. There was nothing else."

We recognize and acknowledge that the Board was presented with evidence supporting the Powers' position on the pre-existing use issue as it pertains to the racetrack and motor cross facility. However, due to the conflicting testimony presented by the parties, credibility was a particularly important factor in this case. The thrust of the Powers' argument on appeal involves an attempt to persuade this court to re-weigh the evidence, something that we are prohibited from doing. Based on the record before us, we cannot say that the Board's decision to deny "grandfather" or pre-existing status to the racetrack and motor cross trail was arbitrary or capricious, or unsupported by material evidence.

IV.

In their second issue, the Powers contend that the trial court erred in failing to hold that the circular racetrack and the motor cross trail were allowable "expansions" of the pre-existing uses of their property, *i.e.*, the demolition derby and the parking lot. The Powers cite T.C.A. § 13-7-208(c) in support of this contention. That statute provides in relevant part as follows:

> Industrial, commercial or other business establishments in operation and permitted to operate under zoning regulations or exceptions thereto in effect immediately preceding a change in zoning shall be allowed to expand operations and construct additional facilities which

> involve an actual continuance and expansion of the activities of the industry or business which were permitted and being conducted prior to the change in zoning; provided, that there is a reasonable amount of space for such expansion on the property owned by such industry or business situated within the area which is affected by the change in zoning, so as to avoid nuisances to adjoining landowners.

Id. The issue raised is whether the racetrack and motor cross trail "involve an actual continuance and expansion of the activities of the industry or business which were permitted and being conducted prior to the change in zoning." ***Id.***

As the Board correctly argues in its brief, the Powers have raised this issue for the first time on appeal. It was not presented to either the Board or the trial court below. In this regard, the Powers' brief acknowledges that

> [t]his issue was not specifically addressed by the board, or the court. However, since the question involved the application of the "grandfather statute," this part of the statute must be presumed to have been considered.

We do not agree that this presumption logically follows.

At the Board's June 12, 2000, hearing, counsel for the Powers stated the following to the Board: "[t]he issue before you is was this business in existence when zoning went into effect? *And that is the only issue*." (Emphasis added). The issue of whether the various uses of the Powers' property predated the zoning ordinance is entirely different from the issue of whether uses are allowable under the "expansion" concept embedded in T.C.A. § 13-7-208(c). This latter issue was neither presented to nor addressed by either the Board or the trial court. Issues not raised below cannot be raised for the first time on appeal. ***Simpson v. Frontier Community Credit Union***, 810 S.W.2d 147, 153 (Tenn. 1991). For this reason, we will not address the "expansion" issue.

V.

The judgment of the trial court is affirmed and the case is remanded. The costs on appeal are assessed to the appellants, Norman and Mary Lynne Power. This case is remanded to the trial court for collection of costs assessed there.

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CHARLES D. SUSANO, JR., JUDGE